82-1175

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1982

NORBERT R. BERG, individually, and on behalf of all other persons similarly situated,

Appellant,

v.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does Wisconsin's statutory licensing scheme for the hunting of deer and bear deny non-resident landowners their constitutional rights guaranteed by the Privileges and Immunities Clause of Article IV, §2 of the Constitution?

2. Does Wisconsin's statutory licensing scheme for the hunting of deer and bear deny non-resident landowners their constitutional rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the Constitution?

LIST OF PARTIES IN PROCEEDING BELOW

Norbert R. Berg, individually, and on behalf of all other persons similarly situated, was the Plaintiff-Appellant in the proceeding below. The State of Wisconsin, its Department of Natural Resources, and Carroll D. Besadny, the Department's Secretary, in his official capacity, were the Defendants-Respondents in the proceeding below.

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No._____

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October Term, 1982

NORBERT R. BERG, individually, and on behalf of all other persons similarly situated,

Appellant,

v.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

Appellant, Norbert R. Berg, individually, and on behalf of all others similarly situated, appeals from the final judgment of the Supreme Court of Wisconsin, dated October 11, 1982.

OPINIONS BELOW

The opinions of the Supreme Court of Wisconsin, the Wisconsin Court of Appeals and the Circuit of Dane County have not been reported. They are reprinted in the Appendix, p. A-1, infra.

JURISDICTION

The final judgment of the Supreme Court of Wisconsin was entered on October 11, 1982. The judgment denied Appellant Norbert R. Berg's request for a review of an adverse decision of the Wisconsin Court of Appeals, dated August 20, 1982.

A Notice of Appeal to this Court was duly filed with the Clerk of the Supreme Court of Wisconsin on January 6, 1983. A copy of the Notice of Appeal was also filed with the Circuit Court of Dane County, the court possessing the record, on January 6, 1983.

This Appeal is being docketed in this Court within 90 days from the Supreme Court of Wisconsin's decision. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article IV, § 2:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

United States Constitution, Fourteenth Amendment, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes:

§ 29.01(8):

"Resident" means a person who has maintained his or her place of permanent abode in this state for a period of 30 days immediately preceding his or her application for license. Domiciliary intent is required to establish that a person is maintaining his or her place of permanent abode in this state. Mere ownership of property is not sufficient to establish domiciliary intent. Evidence of domiciliary intent includes, without limitation, the location where the person votes, pays personal income taxes or obtains a driver's license.

§ 29.12(1):

Nonresident hunting licenses shall be general, deer, bear, small game or archer hunting licenses, and shall be issued subject to § 29.09 by the department or by a county clerk to persons applying for these licenses who are not residents. The fee for each general license is $125, for each nonresident deer license is $80, for each nonresident bear license is $100, for each nonresident small game license is $60, for each nonresident archer hunting license is $60 and for each nonresident 5-day small game license is $25.

§ 29.24:

The owner or occupant of any land, and any member of his or her family may hunt foxes, raccoons, woodchucks, rabbits and squirrels on the land without a license at any time . . .

§ 29.105(1):

A resident deer hunting license shall be issued subject to § 29.09 by the department or by a county clerk, on a

blank furnished by the department, to any resident applying for this license. The fee for this license is $10.50. A resident deer hunting license authorizes the hunting of deer with firearms only.

§ 29.109(1):

A resident bear hunting license shall be issued subject to § 29.09 by the department or by a county clerk, on a blank furnished by the department, to any resident applying for this license. The fee for this license is $10.50. A resident bear license authorizes the hunting of bear with firearms only. Except as provided in sub. (2), a resident bear license may not be issued on or after the opening date of the bear season.

§ 29.109(2):

Bear hunting licenses shall be issued either before or after the opening of the season at resident fees to any member of the U.S. armed forces . . . and: (a) Is stationed in Wisconsin; or (b) Is a Wisconsin resident on furlough or leave.

§ 29.09(12)(a):

Fishing licenses, small game hunting licenses and deer hunting licenses shall be issued at resident fees by the department and by the county clerks to any student or to any member of the armed forces of the United States applying therefor, who exhibits proof that he is in active service with such armed forces and that he is stationed in Wisconsin or that he is a registered full-time undergraduate student in residence of a college or university, public or private, located in this state and offering a bachelor's degree or is a citizen of a foreign country temporarily residing in this state while attending a Wis-

consin high school or an agricultural short course at the University of Wisconsin.

STATEMENT OF THE CASE

Appellant Norbert R. Berg (hereinafter "Berg"), a Minnesota resident, owns forty acres of land in Barron County, Wisconsin on which he maintains an all-season dwelling. For many years he has used substantial portions of his property as a wildlife preserve. As a landowner, Berg is subject to the general taxing authority of Wisconsin.[1]

Berg wishes to hunt deer and bear on his own land and on other parcels of land, public and private, in Wisconsin. The Wisconsin game laws, Wis. Stat. § 29 et seq., require him to pay approximately seven to nine times as much for a license to hunt deer or bear as resident landowners must pay. Although Berg does not reside in Wisconsin, he contends that he should be treated in the same manner as other Wisconsin landowners.

On November 14, 1980 Berg, on behalf of himself and all others similarly situated, sued the State of Wisconsin, its Department of Natural Resources and the Secretary of the Department, Carroll D. Besadny for declaratory and injunctive relief. He alleged that the nonresident license fees to hunt deer and bear: (1) bore no reasonable relationship to the care, preservation or management of wild life in Wisconsin; (2) arbitrarily discriminated against nonresident landowners; (3) violated the Privileges and Immunities Clause of Article IV, § 2 of the Constitution; and (4) violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

[1] Specifically, Berg pays virtually all Wisconsin taxes, including property tax. He does not pay state income taxes.

The defendants filed a Notice of Motion and Motion to Dismiss on November 25, 1980. Arguing that *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), controlled, the defendants asserted that differentiation in hunting license fees for residents and nonresidents was permissible. The plaintiffs replied on March 9, 1981, contending that the Wisconsin regulatory scheme contravened both the Privileges and Immunities Clause of Article IV of the Constitution and the Equal Protection Clause of the Fourteenth Amendment.

The Court granted Defendants' Motion to Dismiss on October 26, 1981, found that the challenged Wisconsin regulatory scheme did not violate the Constitution. Among other things, the Court ruled that (1) Berg was a non-resident landowner in Wisconsin; (2) big game hunting by non-resident landowners is not a fundamental right; and (3) Wisconsin's regulatory scheme is reasonably related to the State's conservation interest.

The Plaintiff appealed to the Wisconsin Court of Appeals on December 4, 1981. The Court affirmed the lower court's decision on August 20, 1982. Specifically, it held that the regulatory scheme did not violate either the Privileges and Immunities Clause or the Equal Protection Clause of the Constitution. Subsequently, the plaintiffs appealed to the Wisconsin Supreme Court. That Court affirmed the decision of the Court of Appeals decision on October 11, 1982.

THE QUESTIONS ARE SUBSTANTIAL

1. The Wisconsin Supreme Court's Decision Permitting The State To Require Non-Resident Landowners To Pay Exponentially More For Licenses To Hunt Deer and Bear Than Residents Contravenes This Court's Prior Rulings Interpreting The Privileges and Immunities Clause of Article IV, § 2 of the Constitution.

The question whether the Privileges and Immunities Clause of Article IV, § 2 of the Constitution prohibits states from charging non-resident landowners seven to nine times as much for a hunting license than residents is substantial. This Court has never before confronted this issue.

This Court has recognized that the right of a United States citizen to use and enjoy his property is fundamental. *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230). Legal residence in a state other than the one in which the property is owned does not diminish this right. On the contrary, the Constitution requires that states accord non-residents the same fundamental rights that they grant to their own citizens. *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

The Privileges and Immunities Clause of Article IV, § 2 of the Constitution protects a non-resident's fundamental rights. It insures ". . . to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). For instance, the clause protects a non-resident who enters another state to work, *Hicklin v. Orbeck, supra*, to hunt commercial game, *Toomer, supra*, to procure medical services, *Doe v. Bolton*, 410 U.S. 179 (1973) or to take and hold real estate, *Ward v. Maryland*, 79 U.S. 163 (1871).

Hicklin, supra, set the proper standard of review under the Privileges and Immunities Clause. All legislation affecting a non-resident's ability to exercise a fundamental right on the same basis as a resident must pass a two-part test. First, the state must prove ". . . that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Hicklin, supra*, at 525-526. Second, the Court must find a "substantial relationship" between the evil and the discrimination practiced against the non-residents. *Id.* at 527.

Wisconsin has not demonstrated that non-resident landowners are the "peculiar source" of any evil addressed by its licensing scheme.[2] It has argued that it charges non-residents more for hunting licenses in order to protect its big game population. In the same breath, however, Wisconsin admits that there are currently no limits on the sales of licenses to either resident or non-resident hunters. Defendants' Brief in Opposition to Plaintiffs' Reply Brief in Opposition to Defendants' Motion To Dismiss, Circuit Court of Dane County, at 12. In fact, in 1980 it awarded almost forty times as many hunting licenses to residents as it did to non-residents. Defendants-Respondents Brief, Appeal to the Court of Appeals of Wisconsin, at 16. Certainly, if Wisconsin's goal is to preserve its big game population it would not sell hunting licenses to anybody who is of requisite age and who is willing to pay.

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[2] The Wisconsin licensing system concerning hunting, and as it affects Berg, may be described as follows. First, as an "owner or occupant" of land in Wisconsin, he may hunt on his own land without any license foxes, raccoons, rabbits and squirrels. Wis. Stat. § 29.24. He may not, however, hunt deer or bear anywhere in the State without obtaining a non-resident license and paying between seven and nine times the fee a resident must pay to obtain the same license. Wis. Stat. §§ 29.12(1), 29.105(1), 29.109(1). The statutory definition of resident for hunting license purposes precludes him from claiming residency. Wis. Stat. 29.01(8).

Thus, Wisconsin cannot argue that non-resident landowners unreasonably deplete the big game population or make the conservation task any more difficult.

Wisconsin's second justification for the fee differential is a cost argument. Berg does not dispute that Wisconsin maintains a segregated fund devoted to maintaining fish, game and wildlife programs under the aegis of the Wisconsin Department of Natural Resources. However, Berg's taxes pay for precisely those services which make hunting possible for residents and non-residents alike, *e.g.*, county roads, fire protection, assistance by sheriff's departments to enforce game laws, etc. Thus, the rationale advanced by the State does not withstand scrutiny.[8]

Even if non-resident landowners were the peculiar source of evil addressed by the licensing and conservation scheme, Wisconsin has not chosen a cure that bears a "substantial relationship" to the malady. Indeed, the cure discourages the preservation of its big game. Wisconsin now sells licenses to hunt deer and bear to virtually all applicants. There are no license limits. It encourages hunting by offering to its residents, foreign students and members of the armed forces the right to hunt at reduced rates. Certainly, this cannot be deemed conservation.

Finally, Berg contends that *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), does not control the instant case. The prevailing argument in *Baldwin* did not address the interests of non-resident landowners. It ruled

[8] The ultimate irony in this case is that non-resident landowners are one of the few groups of non-residents actually forced to pay the higher licensing fees. Wisconsin permits both foreign students temporarily residing in Wisconsin and non-resident members of the armed forces to hunt at resident rates. Wis. Stat. §§ 29.109(2), 29.09(12)(a).

only that states may constitutionally charge transient nonresidents who are not subject to the general taxing authority of the state higher hunting license fees than residents. Berg, a landowner, is subject to the general taxing authority of Wisconsin. Similarly, Montana's conservation scheme was more strict than Wisconsin's. Montana imposed a restriction on the number of licenses sold. Given the small population of elk in Montana, a need to limit the number of hunters depleting their numbers existed. Wisconsin cannot demonstrate this need since it welcomes ever-increasing numbers of big game hunters.

For the above reasons, this Court must conclude that Wisconsin unjustifiably discriminated against non-resident landowners who wish to hunt deer and bear on either their own land or elsewhere in Wisconsin. These individuals have a fundamental right to use their land in the same manner as other Wisconsin landowners. Similarly, their yearly tax payments qualify them for the right to hunt throughout the State at the rates charged residents.

This case also presents the Court with the opportunity to define more precisely the parameters of the protections afforded by the Privileges and Immunities Clause. The Supreme Court of Wisconsin committed itself to the view that unequal treatment of residents and nonresident landowners was constitutionally permissible so long as essential activities or rights were not affected. This approach has recently come under attack. *See, e.g.*, Jonathan Varat, *State "Citizenship" and Interstate Equality*, 48 U. of Chi. L. Rev. 487 (1981).

The diverging views stem from the vexing problem of defining "fundamentality." In *Baldwin, supra*, the Court declined to explain what generally distinguishes fundamental privileges. Instead, it ruled that, whatever the dividing line,

recreational elk-hunting by transients was not fundamental. Although Justice Blackmun did suggest that he had in mind the "modern . . . sense" of fundamentality applied in *Corfield v. Coryell, supra,* no precise elucidation of this "modern sense" now exists. *Baldwin, supra* at 386-387.

The lack of a precise definition of fundamental rights narrows the ambit of the Privileges and Immunities Clause. If fundamentality under Article IV is similar to the fundamental right analysis under equal protection, the Privileges and Immunities Clause would be rendered superfluous. Even if it is deemed different, what is the touchstone? *Varat, supra* at 512. Indeed, is it even necessary that a right be fundamental to merit protection by the Privileges and Immunities Clause? *Baldwin* left all of these questions unanswered.

Hicklin, supra, also called into question the continued vitality of the fundamental rights analysis in *Baldwin.* In *Baldwin,* Justice Brennan had criticized the majority's inquiry into whether elk-hunting was a fundamental right, and asserted that ". . . our primary concern is the State's justification for its discrimination." *Baldwin, supra,* 436 U.S. at 402 (Brennan, J., dissenting). Justice Brennan, writing for a unanimous court in *Hicklin* used, for the most part, the very analysis he advocated in *Baldwin.* This may indeed signal the abandonment of the fundamental rights analysis. For discussions of this point by lower courts, *See, e.g., Piper v. Supreme Court of New Hampshire,* 539 F. Supp. 1064 (D.N.H. 1982) and *Hawaii Boating Association v. Water Transportation Facilities Division, Department of Transportation, State of Hawaii,* 651 F. 2d 661 (9th Cir. 1981).

In summary, this case provides the opportunity for the Court to clarify the contours of the Privileges and Immunities Clause of Article IV, § 2 of the Constitution. The effort is necessary given the current confusion surrounding it.

2. The Wisconsin Supreme Court's Decision Permitting The State To Require Non-Resident Landowners To Pay Exponentially More For Licenses To Hunt Deer And Bear Than Residents Violates This Court's Prior Ruling Interpreting The Equal Protection Clause Of The Fourteenth Amendment To The Constitution.

This case presents for the first time before this Court the question of whether the Equal Protection Clause of the Fourteenth Amendment prohibits a state from differentiating between the rights afforded to non-resident landowners and residents. It is a substantial question worthy of review by this Court.

Berg contends that the Wisconsin regulatory scheme denies him the use of his own property to hunt big game unless he pays seven to nine times the fees residents pay for the same privilege whether or not they own any land. When a state differentiates between the rights of individuals, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose. Some particularly invidious distinctions require a more rigorous scrutiny. *Zobel v. Williams*, —— U.S. ——, 72 L.Ed. 2d 672 (1982). In the instant case, the Wisconsin courts, employing only the rationality standard, upheld the constitutionality of its regulatory scheme. That decision was erroneous as a matter of law and must be reversed.[4]

The following facts bring this case properly within the ambit of equal protection: Berg, a Minnesota resident and

[4] Since the Wisconsin statutory scheme does not pass even the rationality standard, the higher level of scrutiny, as a matter of law, cannot be satisfied.

an owner of Wisconsin property, desires to hunt big game on his land and throughout several northern counties of the State. Under the current regulatory scheme, he may do so only if he purchases a non-resident hunting license which costs him seven to nine times more than it costs other Wisconsin residents. The discrimination is based solely on his legal residence being maintained in a neighboring state. He contends that this regulatory scheme violates his right to equal protection.

The regulatory structure bears no rational relation to Wisconsin's legitimate interest in conserving its wildlife. Wisconsin does not limit at all the number of persons who may hunt big game. It is not, therefore, engaged in "conservation." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977). On the contrary, Wisconsin is selling access to its big game to whomever can pay the fee.

Similarly, Wisconsin cannot logically argue that it may charge Berg more for a hunting license because, as a non-resident, he does not support the cost of running the State's big game management program. Berg is unquestionably subject to the general taxing authority of Wisconsin. He pays taxes which not only support local schools, but which underwrite a variety of ancillary services which make hunting possible in Wisconsin. The taxes help Barron County, for example, pay for roads, fire suppression and assistance by the sheriff's department to enforce the game laws.[5]

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[5] The paucity of Wisconsin's argument is further demonstrated by its willingness to permit foreign students and non-resident armed forces personnel to hunt at reduced rates. No member of either group qualifies as a resident under the applicable Wisconsin statute. Yet, both groups are singled out by the State for preferred treatment. In essence, the State has waived the residency qualifications as they apply to these groups. Berg asks for similar treatment.

Lower courts have ruled that states may not charge non-resident landowners higher license fees than residents to hunt on their own property. In *Pavel v. Pattison*, 24 F. Supp. 915 (D.C. La. 1938), the court invalidated a Louisiana statute which prohibited non-resident landowners who had not resided in the state for at least one year from trapping animals on their own property. The court opined that if a state could deny trapping privileges to those who had not resided in the state for at least one year, it could also make the term ten or even twenty years. It easily pierced the state's argument that non-residents did not pay taxes and did not contribute to the enforcement of the state's game laws, arguing that the non-resident's land was still potentially subject to taxes like anyone else's land. The court concluded that the statute violated the Equal Protection Clause in denying the landowner the right to use his property on the same footing with other landowners residing in the state.[6]

Wisconsin arbitrarily discriminates between non-resident landowners and residents. In addition, it discriminates without justification between certain classes of non-residents, i.e. between non-resident landowners like Berg and non-landowning non-residents like alien students and armed forces personnel. There is no justification for this disparity. Its regulatory scheme is an arbitrary and irrational denial of equal protection of the laws which must be overturned.

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[6] Shortly after this decision, the Louisiana Legislature amended the statute to permit non-residents to obtain trapping licenses on the payment of a $200 fee and the posting of a $300 deposit. Residents only had to pay $2 and were not required to leave a deposit. The court held, in *Pavel v. Richard*, 28 F. Supp. 992 (D.C. La. 1938), that this statute was also repugnant to the Equal Protection Clause.

CONCLUSION

For the above reasons, this Court should note probable jurisdiction of this appeal.

Respectfully Submitted,

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APPENDIX

APPENDIX A

Office of the Clerk
SUPREME COURT
State of Wisconsin
Madison, October 11, 1982

To: Craig W. Gagnon
Pierce A. McNally
4824 IDS Center
Minneapolis, MN 55402
Hon. William D. Byrne
City-County Building
Madison, WI 53709
James P. Altman
Asst. Attorney General

The Court today announced an order in your case as follows:

No. 81-2366

Berg v. State of Wisconsin, et al.

(T.C. 80-CV-6759)

The court having considered plaintiff-appellant-petitioner Norbert R. Berg's petition for review of an adverse decision of the court of appeals, district IV, dated August 20, 1982,

IT IS ORDERED that the petition for review is denied, without costs.

MARILYN L. GRAVES
Clerk of Supreme Court

APPENDIX B

State of Wisconsin — In Court of Appeals
District IV

No. 81-2366 Filed August 20, 1982

NORBERT R. BERG, individually and on behalf of all other persons similarly situated,
Plaintiff-Appellant,

v.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,
Defendants-Respondents.

APPEAL from an order of the circuit court for Dane county: WILLIAM D. BYRNE, Judge. *Affirmed.*

Before Gartzke, P.J., Bablitch and Dykman, JJ.

PER CURIAM. Norbert Berg appeals from the order of the circuit court dismissing his complaint for failure to state a claim upon which relief could be granted.

Berg is domiciled in Minnesota but owns a seasonal residence in Wisconsin. His complaint alleged that the "big game" (deer and bear) hunting fee imposed upon nonresidents by sec. 29.12, Stats., violates the privileges and immunities and equal protection clauses of the United States Constitution.

Access by nonresidents to recreational big game hunting in Wisconsin is not a right protected by the privileges and immunities clause. *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 388 (1978). Nor does the distinction between residents and nonresidents violate the equal protection clause. *Id.*, at 389.

We reject Berg's contention that because members of the armed forces stationed in Wisconsin and citizens of foreign countries residing in Wisconsin while attending high school can secure certain licenses at resident fees the licensing scheme violates the equal protection clause. A rational basis exists for those exceptions. Unlike nonresidents, members of the excepted classes are subject to the general taxing powers of Wisconsin while stationed or attending high school in the state.

By the Court.—Order affirmed.

Inclusion in the official reports is not recommended.

APPENDIX C

State of Wisconsin — Circuit Court—Branch 9, Dane County

Case No. 80CV6759

NORBERT R. BERG, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Defendants.

RULING ON MOTION TO DISMISS

This matter is before the Court on defendants' motion to dismiss the complaint filed by Norbert R. Berg pursuant to Wis. Stats., sec. 802.06(2)(f).

The plaintiff alleges that he has owned a seasonal residence consisting of a residential dwelling structure and approximately forty acres of land in Barron County, Wisconsin, upon which he has paid local property taxes since 1972. Plaintiff further alleges that he spends more than 30 days each year at this seasonal residence. Plaintiff objects to paying non-resident big game (deer and bear) hunting license fees because he owns real estate and pays taxes thereon in Wisconsin.

The complaint alleges that the big game hunting fee imposed by Wis. Stats. sec. 29.12 upon plaintiff and members of plaintiff class is unconstitutional on its face or in its application. Plaintiff prays for declaratory and injunctive relief as follows: 1) Declaring this action to be a proper class action pursuant to Rule 803.08 of the Wisconsin Rules of Civil Procedure; 2) Declaring plaintiff and the members of plaintiff class are residents for purposes of application of Wis. Stats., sec. 29.12, or in the alternative declaring that the big game hunting license fee imposed by Wis. Stats., sec. 29.12 upon plaintiff and members of plaintiff class is unconstitutional on its face or in its application to plaintiff and members of the plaintiff class; 3) Requiring the defendants and their agents to issue resident big game hunting licenses to plaintiff and members of the plaintiff class or in the alternative enjoining the enforcement of Wis. Stats., sec. 29.12 against plaintiff or members of the plaintiff class.

The issue before the Court is whether the State of Wisconsin's requirement that the plaintiff, a Minnesota resident who owns a seasonal residence in Wisconsin on which he pays property taxes, purchase a non-resident hunting license is violative of the Privilege and Immunities and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. For the reasons discussed below, the

Court finds that the requirement is not violative of the Privileges and Immunities and Equal Protection Clauses. Thus, defendants' motion to dismiss is granted since plaintiff's complaint fails to state a claim upon which relief can be granted.

The test for determining whether a motion to dismiss for failure to state a claim should be granted was set forth in *Ollerman v. O'Rourke*, 94 Wis. 2d 17, 24, 288 NW 2d 95 (1980):

> "The motion to dismiss for failure to state a claim, like the previously used demurrer, tests the legal sufficiency of the claim. The facts pleaded and all reasonable inferences from the pleadings were admitted to be true, but only for the purpose of testing the legal sufficiency of the claim, not for the purpose of trial. The pleadings are to be liberally construed with a view to substantial justice to the parties. The complaint is not required to state all the ultimate facts constituting each cause of action; and the complaint should be dismissed as legally insufficient only if it is quite clear that under no conditions can the plaintiff recover."

Therefore, the Court bases its decision on the legal sufficiency rather than the factual sufficiency of plaintiff's claim.

Defendants cite *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 369, 98 S. Ct. 1852 (1978) as support for their position. In *Baldwin*, the United States Supreme Court held that access by non-residents to recreational big game hunting in Montana did not fall within the category of rights protected by Privileges and Immunities Clause. The court stated:

> "Appellants' interest in sharing the limited resource on more equal terms with Montana residents simply does

> not fall within the purview of the Privileges and Immunities Clause. Equality in access to Montana elk is not basic to the well-being of the Union. Appellants do not—and cannot—contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel . . . . Whatever rights or activities may be 'fundamental' under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by non-residents in Montana is not one of them."

Thus, the Wisconsin regulatory system concerning hunting as it affects plaintiff Berg is not violative of the Privileges and Immunities Clause. Big game hunting by non-residents in Wisconsin, like elk hunting by non-residents in Montana, is not a "fundamental" right under the Privileges and Immunities Clause.

The challenged Wisconsin regulatory scheme is also not violative of equal protection. In *Baldwin, supra,* the United States Supreme Court held that a differentiation between big game license fees of residents and non-residents is constitutionally permissible on the grounds that a resident is subject to the "general taxing power" of the state which pays for all the incidents of the big game hunting. Although plaintiff Berg as a landowner in Wisconsin is subject to local property taxes, he is not subject to those taxes which resident Wisconsin taxpayers must pay: state income taxes, state excise taxes, etc. Thus, plaintiff Berg and the class he represents are not subject to the "general taxing power" of the state within the meaning of *Baldwin.* Therefore, the fact that he and others like him own land in Wisconsin is irrelevant to the issue of whether they should be classified as a "resident" for the purpose of imposing hunting license fees.

In *Baldwin, supra*, the Supreme Court also stated that the differentiation between big game license fees of residents and non-residents is not violative of equal protection where it is reasonably related to the preservation of a finite resource and a substantial regulatory interest of the state. The challenged regulatory scheme in the instant case, like the regulatory scheme discussed in *Baldwin*, is reasonably related to the State of Wisconsin's interest in the preservation of big game. As defendants have stated in their brief, the state's objective of preserving big game can only be achieved through the maintenance of a proper habitat and the regulation of human pressures. Thus, the out-of-state license fees imposed on plaintiff Berg are not unreasonably related to the preservation of wild game in Wisconsin.

The fact that Wisconsin might have enacted a licensing scheme more closely related to the basic costs of the state does not render the differential in cost between residents and non-residents unconstitutional. "A statutory classification impinging upon no fundamental interest . . . need not be drawn so as to fit with precision the legitimate purposes animating it . . . . That (Wisconsin) might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." *Baldwin, supra*, 436 U.S. at 390. (Quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813, 96 S. Ct. 2488, 2499 (1976)).

Consequently, defendants' motion to dismiss is granted on the grounds that the State of Wisconsin's requirement that the plaintiff, a Minnesota resident, purchase a non-resident hunting license is not violative of the Privilege and Immunities

and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

Dated this 26th day of October, 1981.

BY THE COURT:
WILLIAM D. BYRNE, Judge
Circuit Court Branch 9

Copies to:
Assistant Attorney General James Altman
Attorney Pierce McNally

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

No. 81-2366

NORBERT R. BERG, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Norbert R. Berg, individually and on behalf of all others similarly situated, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of

Wisconsin, denying the petition for review, entered on October 11, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

OPPENHEIMER, WOLFF, FOSTER, SHEPARD AND DONNELLY
By CRAIG W. GAGNON
PIERCE A. McNALLY
RUPERT M. MITSCH
4824 IDS Center
Minneapolis, MN 55402
(612) 332-6451
Counsel for Appellants

Seal—Wisconsin Supreme Court,
January 6, 1983.
Seal—Circuit Court of
Dane County,
January 6, 1983.

APPENDIX E

PROOF OF SERVICE

I, Matthew Jacobs, hereby certify that the original and one copy of Notice of Appeal to the Supreme Court of the United States, a copy of which is attached, was personally served and filed at the office of the Clerk of Court of the Supreme Court of the State of Wisconsin; that I personally served two copies of Notice of Appeal to the Supreme Court of the United States at the office of the Clerk of Court of Dane County and that I personally served a copy of Notice of Appeal to the Supreme Court of the United States on James

P. Altman, Esq. at 114 East, State Capitol, Madison, Wisconsin.

All of the above parties having been served on January 6, 1982.

/s/ MATTHEW JACOBS

APPENDIX F

State of Wisconsin — Circuit Court
County of Dane — Second Judicial District

File No. 80CV6759

NORBERT R. BERG, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Defendants.

SUMMONS

To the above-named defendants:

You are hereby summoned and required to serve upon plaintiff's attorneys, whose address is as appears below, an Answer to the Complaint which is herewith served upon you within 45 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default

will be taken against you for the relief demanded in the Complaint.

Dated: November 14, 1980

OPPENHEIMER, WOLFF, FOSTER, SHEPARD AND DONNELLY
By CRAIG W. GAGNON
MADGE THORSEN
PIERCE McNALLY
4824 IDS Center
Minneapolis, MN 55402
612 332-6451

State of Wisconsin
County of Dane

Circuit Court
Second Judicial District

File No. 80CV6759

NORBERT R. BERG, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,

Defendants.

COMPLAINT

For his complaint against defendants, plaintiff states and alleges:

PARTIES

1. Plaintiff is employed in and maintains a year-round residence in the State of Minnesota.

2. Plaintiff maintains a seasonal residence and landholdings for his recreational use and enjoyment in the State of Wisconsin.

3. Defendant, Department of Natural Resources, is an agency of the State of Wisconsin charged with the duty, inter alia, of collecting license fees for hunting upon lands within the State of Wisconsin.

4. Defendant, Carroll D. Besadny, Secretary of the Department of Natural Resources, is charged with the responsibility of the administration of said agency.

CLASS ALLEGATIONS

5. Plaintiff brings this suit individually and on behalf of a class consisting of all persons who maintain seasonal residences and landholdings in the State of Wisconsin who are deprived of the right to hunt big game in the State of Wisconsin on the same basis as those persons defined as Wisconsin residents under Wisc. Stat. 29.01(8).

6. Plaintiff class is so numerous that joinder of all members is impracticable.

7. The questions before the court are of a common or general interest to all members of the plaintiff class.

8. Plaintiff's claims are typical of the claims of the plaintiff class.

9. Plaintiff will fairly and adequately represent and protect the interest of the plaintiff class.

10. The defendants have acted and refused to act on grounds which are applicable to plaintiff and all members of the plaintiff class in a manner which makes appropriate final injunctive and declaratory relief with respect to the class as a whole.

COUNT I

11. Plaintiff's Wisconsin residence consists of a residential dwelling structure and approximately forty acres of land, all of which is located in Barron County, Wisconsin.

12. Plaintiff has preserved and developed his seasonal residence and Wisconsin land as a habitat for birds, deer and other game animals.

13. Plaintiff has paid all property taxes and other assessments on his seasonal residence and Wisconsin land since he acquired it in 1972.

14. Plaintiff and his family have resided at his seasonal residence and Wisconsin land for a period of more than thirty days in each calendar year since 1972.

15. During such times that plaintiff and his family have resided at his seasonal residence and Wisconsin land, plaintiff has paid sales taxes to the State of Wisconsin and has financially supported the State of Wisconsin in the same fashion as other Wisconsin residents.

16. Plaintiff is required by Wisc. Stat. §29.12 to pay nonresident license fees for himself and members of his family to hunt big game animals at his seasonal residence and Wisconsin land and elsewhere in the State of Wisconsin.

17. Nonresident big game hunting license fees are imposed upon plaintiff and members of his family notwithstanding:

a) plaintiff's contribution to the general fund tax revenues of the State of Wisconsin;

b) plaintiff's contribution to the natural habitat for the game population of the State of Wisconsin; and

c) Wisc. Stat. §29.24(2) which treats plaintiff and members of his family in the same manner as resident landowners for purposes of hunting small game on his land.

18. Nonresident big game license fees are excessive, arbitrary and unreasonable when compared to the license fee imposed upon Wisconsin residents.

19. Wisc. Stat. §29.12 on its face and as applied to plaintiff,

a) bears no reasonable relationship to the care, preservation or management of wild life within the State of Wisconsin or to any other legitimate public purpose;

b) arbitrarily and unreasonably discriminates against plaintiff and members of his family;

c) violates the privileges and immunities clause of the United States Constitution, Art. IV §2;

d) violates the Fourteenth Amendment equal protection clause of the United States Constitution and further constitutes a deprivation of the use and enjoyment of property without due process of law, and

e) violates the Constitution of the State of Wisconsin, Art. I §1.

WHEREFORE, plaintiff prays for declaratory and injunctive relief as follows:

1. Declaring this action to be a proper class action pursuant to Rule 803.08 of the Wisconsin Rules of Civil Procedure.

2. Declaring plaintiff and the members of plaintiff class are residents for purposes of application of Wisc. Stat. §29.12, or in the alternative declaring that the big game hunting license fee imposed by Wisc. Stat. §29.12 upon plaintiff and members of plaintiff class is unconstitutional on its face or in its application to plaintiff and members of the plaintiff class.

3. Requiring the defendants and their agents to issue resident big game hunting licenses to plaintiff and members of the plaintiff class or in the alternative enjoining the enforcement of Wisc. Stat. §29.12 against plaintiff or members of the plaintiff class.

4. Such other relief as the court deems just and proper.

Dated: November 6, 1980.

OPPENHEIMER, WOLFF,
FOSTER, SHEPARD AND
DONNELLY
By CRAIG W. GAGNON
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Office-Supreme Court, U.S.
FILED
FEB 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1175

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NORBERT R. BERG, individually, and on behalf of all other persons similarly situated,
Appellant,

v.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,
Appellee.

On Appeal From The Supreme Court Of Wisconsin

MOTION TO AFFIRM DECISION BELOW-INSUBSTANTIALITY

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No. 82-1175

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NORBERT R. BERG, individually, and on behalf of all other persons similarly situated,
Appellant,

v.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES and CARROLL D. BESADNY, its Secretary, in his official capacity,
Appellee.

On Appeal From The Supreme Court Of Wisconsin

MOTION TO AFFIRM DECISION BELOW-INSUBSTANTIALITY

MOTION TO AFFIRM

Appellee, under Rule 16.1(d) of the Rules of the Supreme Court of the United States, moves that the final order of the Wisconsin Supreme Court, dated October 11, 1982, denying review of the Wisconsin Court of Appeals' affirmation of the Dane County Circuit Court's dismissal of the appellant's complaint, should be affirmed on the ground that said disposition by the Wisconsin Supreme Court is so obviously correct under the holding in *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371 (1978), as to warrant no further review by this Court.

OPINION BELOW

The opinions and orders of the Wisconsin trial and appellate courts are set forth in Appendix A of the appellant's jurisdictional statement.

JURISDICTION

Appellant has invoked jurisdiction of this Court under 28 U.S.C. §1257(2) on page 2 of his jurisdictional statement.

STATEMENT

Appellee takes issue with the statement of the case in appellant's jurisdictional statement as follows:

1. Appellant has admitted in the Wisconsin courts, in his complaint, briefs and arguments therein:

a. That he is not only a resident of Minnesota but also that he is domiciled in Minnesota;

b. That a state may require nonresident hunting licenses;

c. That a state has "great latitude" within its police power to protect wildlife under *Baldwin*, 436 U.S. at 391.

2. Appellant is domiciled in Minnesota and mere ownership of recreational land in Wisconsin does not subject him to the general taxing authority of Wisconsin

ARGUMENT

The privileges and immunities clause of the fourth and fourteenth amendments to the United States Constitution are not offended herein because this Court has declared that a state does not abridge a

"fundamental right" of federal or state citizenship when it charges nonresidents a higher big game hunting license fee than residents. In *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371, 388 (1978), this Court held:

> We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident's participation therein without similarly interfering with a resident's participation. Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.

The fact that a nonresident, non-domiciliary owns real estate in the state requiring higher nonresident big game license fees does not invoke the privileges and immunities clauses. In *Baldwin*, 436 U.S. at 387, this Court stated:

> [T]he Court dismissed for the want of a substantial federal question an appeal from a decision of the Supreme Court of South Dakota holding that the *total* exclusion from that State of nonresident hunters of migratory waterfowl was justified by the State's assertion of a special interest in wildlife that qualified as a substantial reason for the discrimination. *State v. Kemp*, 73 S.D. 458, 44 N.W.2d 214 (1950), appeal dismissed, 340 U.S. 923, 71 S.Ct. 498, 95 L.Ed. 667 (1951). In that case South Dakota had proved that there was real danger that the flyways, breeding grounds, and nursery for ducks and geese would be subject to excessive hunting and possible destruction by nonresident hunters lured to the State by an abundance of pheasants. 73 S.D., at 464, 44 N.W.2d, at 217.

If a state can completely ban nonresident hunting of certain species of game without presenting a substantial federal question to this Court, the distinction between a nonresident real property owner and nonresident who does not own property becomes meaningless herein in a constitutional sense.

The equal protection clause of the fourteenth amendment to the United States Constitution is not offended because this Court has declared that a state under its police power can classify hunting fees for residents and nonresidents within a rational plan for the preservation of a finite natural resource. In *Baldwin*, 436 U.S. at 390, 391, this Court held:

> All this adds up, in our view, to no irrationality in the differences the Montana Legislature has drawn in the costs of its licenses to hunt elk. The legislative choice was an economic means not unreasonably related to the preservation of a finite resource and a substantial regulatory interest of the State. ... But, as has been noted, appellants concede that a differential in cost between residents and nonresidents is not in itself invidious or unconstitutional. And "a statutory classification impinging upon no fundamental interest ... need not be drawn so as to fit with precision that legitimate purposes animating it. ... That [Montana] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." *Hughes v. Alexandria Scrap Corp.* 426 U.S. 794, 813, 96 S.Ct. 2488, 2499, 49 L.Ed.2d 220 (1976).

....

> We perceive no duty on the State to have its licensing structure parallel or identical for both residents and nonresidents, or to justify to the penny any cost differential it imposes in a purely recreational, noncommercial, non-livelihood setting. Rationality is sufficient. That standard, we feel, has been met by Montana. So long as constitutional requirements have been met, as we conclude is the case here, "[p]rotection of the wild life of the State is particularly within the police power, and the State has great latitude in determining what means are appropriate for its protection." *LaCoste v. Depart. of Conservation,* 263 U.S. 545, 552, 44 S.Ct. 186, 189, 68 L.Ed. 437 (1924).

Big game is a finite resource in Wisconsin and is limited to two types of animals, whitetail deer and black bear. Other big game, such as moose and buffalo, were driven from Wisconsin over 100 years ago by settlement. In fact, Wisconsin's deer herd was threatened in the 1920's by the pressures of settlement, hunting and the disappearance of proper habitat so that in the 1930's, deer hunting was permitted only every other year.

Proper game management of whitetail deer and black bear recognizes, among a host of other variables, the importance of maintaining proper habitat and the regulation of human pressures in order to preserve a healthy, viable and valuable natural resource — big game animals in Wisconsin. Wisconsin's big game situation follows.

*Black Bear.** In 1980, the black bear population was approximately 5,000, located exclusively in the dozenmost northern counties of Wisconsin. Eight hundred were taken by hunting in 1980. Bayfield and Douglas Counties were the number one and two bear kill counties in 1980.

Unlike whitetail deer, bear require wild and isolated habitat for survival. Hunting success in 1980 is consistent with this habitat need. Bayfield and Douglas Counties, which are contiguous, provide some of the wildest tracts of land in the state. Much of this land is managed by public agencies, states, state-county, and federal. Habitat, thus, limits the black bear range to the wildest land in the state — land which today is found only in the most northern counties.

*Whitetail Deer.** In 1980, the whitetail deer population stood at about 800,000 and said animal occurred in every county of the state. In 1930, the deer population was less than 300,000 and was confined to the northern one-third of Wisconsin. Proper management of habitat and the deer herd the past fifty years have made whitetail deer hunting readily available to hunters in all counties despite a dramatic rise in hunting pressure detailed in the following chart:

YEAR	DEER HERD	RESIDENT DEER HUNTING LICENSES — ALL SOURCES, GENERAL, SPORTSMAN, ARCHER, ETC.	NON-RESIDENT DEER HUNTING LICENSES — ALL SOURCES, GENERAL, ARCHER, ETC.
1930	Less than 300,000	77,284	Not Available
1940	600,000	105,056	Not Available
1950	600-800,000	309,455	5,516
1960	600-800,000	335,238	6,909
1970	600-800,000	582,606	22,766
1980	800,000	754,572	19,147

*From public records at the Department of Natural Resources, State of Wisconsin.

The chart shows a clear trend. More people are hunting whitetail deer each decade and the Wisconsin deer herd is a finite resource, having stabilized at about 800,000 animals. In fact, in 1980, one deer license was sold for each deer in the total herd. If this upward trend continues through the next decade, the game managers may be required to alter the license structure to preserve the herd. At the present time, hunter success of one in five plus the variables of habitat, weather, reproduction, etc., keep the herd stable from year to year. As noted, these conditions may change in the future, requiring different licensing based on annual game management evaluations — *e.g.*, a lottery system for issuing licenses and banning nonresident hunting entirely.

Appellant argues that the resident-nonresident licensing law is not regulatory in nature but merely an income producing scheme because no limits are placed on the number of licenses sold and such unlimited sales lead to depletion of the big game natural resource.

Appellant's argument is short-sighted. Wisconsin big game management involves more than just license sales. It includes bag limits, season limits, sex limits, zone limits, age limits and host of other regulatory devices to control hunting. Licensing is just one regulatory tool available in game mangement. As mentioned previously, if hunting big game in Wisconsin continues its upward trend in the future, license sales limits or lotteries or prohibitions on hunting may be required for certain years, for certain areas or persons.

Appellant is not subject to the general taxing authority of Wisconsin. In Wisconsin, real property tax liability is local. That is, real property taxes are collected by the counties, cities, towns and villages and disbursed by said municipalities to pay for local

government expenses and services. Said expenses and services for the most part involve local road repair and maintenance, local police and fire protection to persons and property, local water, sewer and waste disposal and local schools.

The appellant, as a real property owner, pays for and enjoys ready access to his property in all seasons through local road maintenance, and has the benefit of local police and fire protection for his Wisconsin property even while he resides in Minnesota. The happenstance that local road maintenance, local police and fire protection may aid incidently big game hunting cannot be persuasive herein. The main purpose of local property taxes is to provide direct municipal services for the protection and enjoyment of real property owners located in the particular municipality. Finally, local real property taxes are not used to fund state game management programs.

The general taxing authority pays all the incidents of big game hunting in Wisconsin. That is, the "general taxing power" of the state is imposed on its residents day after day throughout the year, whereas nonresidents are subject to only bits of the taxing power of the state — *e.g.*, sales and gasoline taxes while in the state and local property taxes if real estate is owned by nonresidents. Residents, on the other hand, pay not only real estate taxes, sales taxes and gasoline taxes all year, but also state income taxes, state excise taxes and the whole bundle of other state taxes imposed throughout the year. Monies collected from these resident tax sources finance big game habitat and management in Wisconsin.

The following is a non-exclusive list of resident tax sources:

1. The conservation fund, sec. 25.29, Wis. Stats., includes many tax sources — hunting and fishing

license fees, forest income, park income, other licenses, snowmobile licenses, boating fees, forest taxes, sales taxes on boats and snowmobiles, federal taxes collected and returned by formulas (like federal waterfowl stamps and gun and ammunition sales in Wisconsin). Appropriations from the conservation fund are set forth in sec. 20.370, Wis. Stats.

2. Forest Crop Law, sec. 77.02, Wis. Stats. State pays civil towns monies for lands entered into forest crop program in recognition of lost local tax revenues.

3. Outdoor Recreation Program (ORAP), sec. 23.30, Wis. Stats. Funds secured from bonding and general taxes, income and inheritance.

4. Pittman-Robertson Act, 16 U.S.C. §669. Federal funds matched to those appropriated from ORAP and the conservation fund.

5. State interest-free loans to encourage establishment of county forests. Sec. 28.11, Wis. Stats.

6. Operations-wardens', game managers', administrators' salaries and benefits. Secured from conservation fund and general tax revenues, income, sales and inheritance.

The appellant also argues discrimination in nonresident licensing as a real property owner in Wisconsin under secs. 29.09(12) (a) and 29.109(2), Wis. Stats.

Section 29.09(12) (a), Wis. Stats., permits nonresident members of the armed forces, nonresident college students and foreign high school and university short course students to secure resident deer licenses.

Section 29.109(2), Wis. Stats., permits nonresident members of the armed forces to secure resident bear hunting permits while stationed in Wisconsin.

The appellant apparently missed the permissive constitutional distinction set forth in *Baldwin*, 436 U.S. at 388-90. That is, although the persons mentioned in the above statutes are nonresidents, they are, however, residents in fact subject to the "general taxing power" of the state because they are full-time residents of the state for tax purposes, at least while attending school or while stationed in Wisconsin. They must pay state income taxes, state excise taxes, state sales and gasoline taxes, etc., all year. Some also even pay local property taxes and personal property taxes. Therefore, for all practical purposes, the above-described persons are residents for tax purposes and are recognized as such for big game hunting purposes.

In his legal argument, the appellant takes issue with the statutory exceptions to sec. 29.01(8), Wis. Stats., which define the term "resident." Sections 29.09(12) (a) and 29.109(2), Wis. Stats., allow certain nonresidents to secure resident deer and bear hunting licenses. The appellant's argument only makes sense if it is read as an attack on the constitutionality of those exceptions. However, even if the exceptions were constitutionally invalid, their invalidity would not affect sec. 29.01(8), Wis. Stats., or the entire resident-nonresident sport licensing structure of Wisconsin. The appellant still would be a nonresident of Wisconsin by his own admission, as would those persons mentioned in secs. 29.09(12) (a) and 29.109(2), Wis. Stats. (in the event those sections were declared invalid).

The appellant thus argues not that sec. 29.01(8), Wis. Stats., denies him equal protection, but rather that secs. 29.09(12) (a) and 29.109(2), Wis. Stats., deny him equal protection. The plaintiff cannot argue the former because *Baldwin* declares that classification of residents and nonresidents sport hunters under a statute like sec. 29.01(8), Wis. Stats., is permissible under the equal protection clause. As to the latter

argument, if the appellant indeed makes the latter argument and if he were successful, his nonresident status still would not have changed. He merely would have succeeded in invalidating secs. 29.09(12) (a) and 29.109(2), Wis. Stats., without changing his status. Under this view, the appellant really has no claim herein and has no standing to challenge the exceptions to sec. 29.01(8), Wis. Stats.

Appellee respectfully submits, therefore, that this Court's decision in *Baldwin* clearly is dispositive of the questions presented by this appeal, and that the October 11, 1982, order of the Wisconsin Supreme Court should be affirmed without further review by this Court.

Respectfully submitted,

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FILED
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CLERK

No. 82-1175

IN THE

Supreme Court of the United States

October Term, 1982

NORBERT R. BERG, individually, and on behalf of all other persons similarly situated,

Appellants.

vs.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES, and CARROLL D. BESADNY, its Secretary, in his official capacity,

Appellees.

On Appeal From the Supreme Court of Wisconsin

APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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IN THE

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Appellees.

On Appeal From the Supreme Court of Wisconsin

APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16.5 of the Rules of this Court, Appellants hereby oppose Appellees' Motion to Affirm.

ARGUMENT

A. Substantiality of Questions Presented

Appellees admit the substantiality of the questions presented by failure to address the ultimate irony of the case. Nowhere does there appear any justification for the regula-

tory framework currently in place which allows all Wisconsin residents, many temporary residents, i.e. members of the armed services and avowed non-residents, i.e. alien secondary school students, to hunt big game on Norbert Berg's own Wisconsin land for seven to nine times less than it costs Berg to engage in the exact same activity. Any regulatory system so riddled with unjustified exceptions to the clear statutory mandate that non-residents must pay non-resident license fees clearly presents a substantial federal constitutional question. See, e.g. *Pavel v. Pattison*, 24 F. Supp. 915 (D.C.La. 1938) and *Pavel v. Richard*, 28 F. Supp. 992 (D.C. La. 1938).

Appellees inappropriately cite an appeal from a case in the South Dakota Supreme Court for the proposition that ". . . a state can completely ban non-resident hunting of certain species of game without presenting a substantial federal question . . ." Appellees' Brief in Support of Motion to Affirm, page 4. See, *State v. Kemp*, 73 S.D. 458, 44 N.W. 2d 214 (1950), appeal dismissed, 340 U.S. 923 (1951). This Court has already recognized that in the *Kemp, supra*, case the state proved that the evil sought to be remedied arose out of an overabundance of *nonresident* hunters threatening the waterfowl herd with destruction. *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 387 (1978). Wisconsin can make no such showing in this case. There is no limit on the number of big game licenses Wisconsin sells. Furthermore, Wisconsin sells 39 times more resident than non-resident deer hunting licenses. Appellees' Brief in Support of Motion to Affirm, page 6. Therefore, Wisconsin cannot prove that non-resident big game hunters are a peculiar source of evil to the big game herd since whatever evil they

represent is at least 39 times less than that posed by those whom Wisconsin chooses to classify as residents. The case of *State v. Kemp, supra,* is hence wholly inapposite.

B. Appellants' Standing to Pursue Claims

Appellees attempt to raise a non-issue to bolster a litany of irrelevant statistics and inapposite citations. As an aside, the one relevant statistic, which Appellees choose to ignore, is that Wisconsin does not now limit the number of big game hunting licenses it dispenses; rather it arbitrarily reclassifies certain non-residents as residents for big game hunting license purposes to increase revenues. That Appellants are attacking the constitutionality of the Wisconsin residency statute for big game hunting purposes is clear beyond peradventure. Wis. Stats. §29.01(8). They have cited two Wisconsin statutes which, in complete derogation of the strictures imposed by §29.01(8), confer greater big game hunting rights on certain classes of non-residents without justification nor furthering any legitimate state purposes. Wis. Stats. §§29.09(12)(a) and 29.109(2). Appellants have done so to demonstrate the unjustified inequality of treatment among similarly situated classes of people, i.e. non-residents as defined by Wis. Stats. §29.01(8). Appellants must show unjustified disparity of treatment among those similarly situated to lay a claim under the Fourteenth Amendment to the U.S. Constitution. A declaration of unconstitutionality of Wis. Stats. §29.01(8) as applied to Appellants, the relief Appellants seek, would result in being able to hunt big game at resident rates just like armed services members and alien students. Appellants seek to be treated in the same fashion as these two last-mentioned groups of hunters and they submit that a declaration of constitutional infirmity

in Wis. Stats. §29.01(8) as applied to them would accomplish exactly that end. Appellees' misguided contention that success by Appellants herein would not change their status is utterly false and should be diregarded as obfuscation of Appellant's true claim.

CONCLUSION

Appellees' Motion to Affirm is meritless. This Court should note probable jurisdiction and set this case down for full briefing and oral argument.

Respectfully submitted,

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